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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 103

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL.,

Petitioners,

versus

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE,

Respondents.

PETITION OF GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOS. M. RAULT,
WALTER CARROLL,
EDWARD S. BAGLEY,
Attorneys for Petitioner,
825 Whitney Bldg.,
New Orleans 12, La.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL,
Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

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PETITION OF GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

I.

REPORTS OF OPINIONS BELOW

Federal Maritime Commission: H. Kempner v. Lykes Bros. Steamship Co., Inc., et als. Docket No. 732 (with which were consolidated for hearing Docket Nos. 726, 733, 734, and 735). 1 S.R.R. 517, reported at 1962

A.M.C. 743, *sub nom* Isbrandtsen Co., Inc. v. States Marine Co. of Del.

The United States Court of Appeals for the District of Columbia Circuit: H. Kempner, Galveston Cotton Industries, Petitioners v. Federal Maritime Commission (Formerly Federal Maritime Board) and United States of America, Respondents; Gulf/Mediterranean Ports Conference, et al., the common carriers by water, members of the Far East Conference, Intervenors, No. 16,658. This decision has not yet been officially reported.

Copies of the opinions are included herein as Appendix A and Appendix B respectively.

II.

GROUND OF JURISDICTION

The decree sought to be reviewed is that entered on January 10, 1963 by the United States Court of Appeals for the District of Columbia Circuit, reversing a report and decision of the Federal Maritime Commission.[1] Timely motion for rehearing was denied by the Court of Appeals in an order entered February 15, 1963.

Jurisdiction of this Court to review the decree in question is conferred by the United States Code, Title 28, Section 1254(1).

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[1] At the time of the decision below the agency created by the Shipping Act, 1916, was designated as the Federal Maritime Commission. Previously it had functioned under different names. For the sake of consistency it is generally referred to herein as the Federal Maritime Commission or the Commission regardless of the period of time referred to.

III.

QUESTIONS PRESENTED

The Gulf/Mediterranean Ports Conference and its members,[2] common carriers by water in foreign commerce, commencing July 1, 1949 and continuing to the present time, have employed the dual rate contract—non-contract system on cotton from Gulf ports to ports in the Mediterranean area. The firm of H. Kempner, not being a signatory to the contract, paid the higher non-contract rate on its shipments and filed a complaint with the Federal Maritime Commission seeking to have this dual rate system declared illegal and to recover reparations.

The Federal Maritime Commission found that this dual rate system was legal in all respects, that it was not violative of the provisions of the Shipping Act, 1916, including a specific finding that it had approved the institution of the dual rate system: The Commission also held alternatively that if the system had been otherwise illegal its legality was established and confirmed by the so-called "Moratorium" Act[3] which had effect not only prospectively but from the original adoption of the dual rate system. The Commission dismissed the complaint and denied reparations.

The Court of Appeals, in its *per curiam* decision, one

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[2] Lykes Bros. Steamship Co., Inc., States Marine Corporation & States Marine Corporation of Delaware, Compania Maritima del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line - Java New York Line, Compagnie de Navigation Cyprien Fabre, Compagnie Generale Trans-Atlantique, Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines - Fearnley & Eger & A. F. Klaveness & Company, Hellenic Lines, Ltd., Leif Hoegh & Company A/S, Isthmian Steamship Company, Prudential Steamship Corporation and Israeli Judges Line Shipping & Navigation Company, Ltd.

[3] The Moratorium Act, Pub. L. 85-626, 85th Congress, 72 Stat. 574, was enacted August 12, 1958. It amended Section 14 of the Shipping Act, 1916, 39 Stat. 733, 46 USC § 812. See Appendix C, page 67.

judge dissenting, held that the Federal Maritime Commission had not approved the use of this dual rate system when instituted, that the Moratorium Act was prospective only and did not operate to deny reparations covering shipments made prior to its enactment. Although the brief *per curiam* majority opinion, as well as the dissenting opinion, are set out in Appendix B, the majority opinion is given here in full to better illustrate the points at issue:

> "PER CURIAM: The Federal Maritime Board denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act protected the carriers from liability which accrued before its passage.
>
> "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.
>
> Reversed and remanded to the Commission for assessment of reparations."

Accordingly, the questions presented are: 1) whether the Federal Maritime Commission had given such approval as may have been required to the use of this dual rate contract system, and 2) whether the Moratorium Act established and confirmed the legality of the dual rate contract system from its inception, as well as prospectively, and restricted the authority of the Courts, as well as of the Federal Maritime Commission, to hold the system illegal.

IV.

STATUTES INVOLVED

The statutes involved are Sections 14 and 15 of the Shipping Act, 1916, (46 U.S.C.A. 812, 814), the former section having been amended by the Moratorium Act of August 12, 1958 (Publ. L. 85-626, 85th Congress, 72 Stat. 574). These sections of the Act and the Amendment are included in Appendix C.

V.

STATEMENT OF THE CASE

Gulf/Mediterranean Ports Conference is a conference of common carriers in the trade between Gulf ports and ports in the Mediterranean area operating under an agreement approved by the Commission's predecessor on January 23, 1930 and providing for the joint making of rates, rules and regulations.

In compliance with a request from the American Cotton Shippers Association whose membership included all exporters of cotton, on July 1, 1949 the Conference instituted a dual rate contract—non-contract system on cotton from Gulf ports to ports in the Mediterranean area. The dual rate system is one under which the Conference establishes tariffs of rates at two levels, the lower of which is charged merchants who agree to ship by Conference lines only and the higher of which is charged merchants who do not so agree.

H. Kempner, although originally a signatory to the contract, terminated its contract with the Conference and thereafter, beginning in 1951, commenced shipping largely by non-conference lines but paying the non-contract rate on such shipments as it made by conference carriers. It filed a complaint with the Federal Maritime Commission

seeking to have the contract system on cotton declared illegal and sought reparations. After lengthy hearings before an Examiner, in which every facet of the contract system was reviewed thoroughly, the Commission held the contract system to be legal and denied reparations. The record on which this decision was made covered in full detail the request of the cotton shippers themselves for the use of the system, the reasons prompting both the shippers and the conference to adopt the system, the amount and justification for the spread between contract and non-contract rates, the general terms and provisions of the contract, the filing by the Conference with the Commission of the contract form and tariff of rate differentials, together with complete details of all preliminary negotiations with the cotton shippers toward adoption of the contract. The contract was a joint product of the Conference and the shippers concerned.

At the time the Commission decided the case it carefully weighed and considered the facts in the light especially of two important cases relating to dual rate contract systems, *Isbrandtsen Co., Inc. v. U. S.*, 211 F. 2d 51 (D.C. Cir., 1954), cert. den. 347 U.S. 990 (1954), holding that a dual rate system required the Commission's approval in addition to the approval given the basic conference rate making agreement, and *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481, 78 S. Ct. 851 (1958), holding illegal, as violative of the provisions of Section 14, third, of the Shipping Act, 1916, as amended, a dual rate system having a coercive effect on shippers and whose design and effect was to stifle outside competition.

On the question of its approval of this dual rate system the Commission held that it had approved the system in accordance with its practices and procedures

then in effect; and on the question of its possible coercive effect on shippers and stifling of outside competition the Commission held that it had no such purpose or effect. It will have been noted from the majority opinion of the Court of Appeals that the Court in no way questioned the correctness of the latter finding and conclusion of the Commission; the Court's sole point of disagreement with the Commission—aside from the effect of the Moratorium Act—related to the matter of approval or non-approval by the Commission.

As to the Moratorium Act amendment to Section 14 of the Shipping Act, 1916 (August 12, 1958), the Commission did not limit its effect to the period following its enactment but applied it to all dual rate systems which qualified under the terms of the Act. This dual rate system admittedly qualified under the Act. The Commission held that the Act "restricts our authority to construe or apply the Act to make unlawful any dual rate contract arrangement" covered by the Act. On this point the majority of the Court of Appeals disagreed, holding that the Moratorium Act is "prospective only" from the date of its enactment, to which there was a full and vigorous dissenting opinion which concluded that "on the record the Board could have done nothing but what it did do."

VI.

ARGUMENT

A.

The questions presented, it is submitted, require review by this Court.

Dual rate contract systems, similar in all material respects to the one here involved, had been in general

use by conferences for decades and covered the bulk of all general cargo exports carried by common carrier lines. It is a matter of common knowledge that with perhaps one or two exceptions these systems, some sixty or more in number, had received approvals by the Maritime Commission in accordance with its practices and procedures in such cases. Admittedly this did not include the issuance to the conference of a formal certificate or document. No such formal documents have ever been issued by the Commission or its predecessors in respect of any agreement or arrangement which required the Commission's approval under Section 15 of the Shipping Act, even including the basic conference rate-making agreements themselves. Accordingly, if the past practices and procedures of the Commission in respect of dual rate contract systems has been insufficient to confer an approval such as is required by law, then the legality of practically all dual rate systems, at least up to the time of the Moratorium Act, will have been highly questionable. The exact form and procedures required to confer approval under Section 15 of the Shipping Act have not, so far as we know, ever been decided by any court.[4]

If the many dual rate contract systems which had been in use were illegal because not approved with a sufficient degree of formality then a determinative construction of the purpose and effect of the Moratorium Act is necessary. Was this Act "prospective only" as held by the majority below, or did it protect all dual rate systems qualifying under its provisions regardless of time, as found by the minority? Since, as mentioned previously,

[4] *Isbrandtsen Co., Inc. v. U. S.*, 211 F. 2d 51 (D.C. Cir., 1954), cert. den. 347 U.S. 990 (1954), merely held that an "approval" was necessary and that there had been none. But in this case, under new and different procedures adopted by the Commission, objections had been filed with the Commission to the institution of the system which were the subject of a Commission hearing then in progress. Under the circumstances it was admitted that no kind of approval had been given.

substantially all dual rate systems had received the same type of approval as the one here involved, it is important to all of the conferences concerned to have determined the scope and effect of this Act. Except for the decisions of the Commission and the Court of Appeals in this case there appears to have been no case construing the Act specifically as regards the period during which legality was conferred by the Act.[5]

Thus we submit that the questions presented are important questions of federal law not heretofore decided and that they should be decided by this Court.

B.

The Gulf Mediterranean Ports Conference did all that conceivably could be required of it to obtain Commission approval of its dual rate contract system on cotton. It not only filed with the Commission the contract form and the differentials between contract and non-contract rates but, commencing some two months prior to the institution of the system on July 1, 1949, it filed with the Commission the Conference minutes giving full accounts of the several meetings and discussions with the cotton shippers leading up to the adoption of the contract, covering the detailed provisions of the contract, the several amended forms and the final form of the contract, discussions and conclusions as to the shipments which

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[5] Cases which have applied the Moratorium Act or construed it in other respects are:

Swift & Co. v. Federal Maritime Commission, 306 F. 2d 277 (D.C Cir., 1962); *Empire State Highway Transp. Ass'n v. Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir., 1961), cert. den. 368 U.S. 931; *Benson v. U. S.*, 263 F. 2d 899 (D.C. Cir., 1959); *Anglo Canadian Shipping Co. v. U. S.*, 264 F. 2d 405 (9 Cir., 1959); *Gulf and South Atlantic Steamship Agreement*, 1961 A.M.C. 1001 (F.M.B. Docket Nos. 849, 851 and 854); *Pasch v. Chemoleum Corp.*, 209 N.Y.S. 2d 191 (S. Ct., N. Y. County, 1960); *Pasch v. Chemoleum Corp.*, 210 N.Y.S. 2d 738 (S. Ct., N. Y. County, 1960), affirmed 214 N.Y.S. 2d 644 (N.Y. Sup. Ct., Appellate Div.).

were to be included under the contract, the contract—non-contract rate differentials and the reasons why both the Conference and the shippers desired the dual rate system. These filings were made on May 3, 10, 17, 31 and June 1, 13, 16, 21 and 22. They are set out in full in the Joint Appendix at pages 222 to 285, comprising some 65 pages of material. The cotton contract was put into effect on July 1, 1949.

In respect of these filings the Commission in its Report found and held:

> "The procedure by which agreements between carriers are declared legal or illegal under the Act is that they be 1. filed with the Board pursuant to Sec. 15; 2. reviewed; and 3. passed on for legality." Report of Commission p. 13; herein Appendix A, p. 34.
>
> "The facts showing that Mediterranean filed and obtained Board approval of a conference contract and filed transcripts of minutes of its meetings showing agreement among its members for the adoption of the practice of offering dual rates and exclusive patronage contracts and filed tariffs containing dual rate provisions establishes that Mediterranean has filed an agreement pursuant to Sec. 15. * * * These transcripts have been reviewed by the Board's staff and no exception taken thereto. Board approval of both agreements is required; *Isbrandtsen Co., Inc. vs. U. S.*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954), and approval has been given. The Board's approval was neither subsequent nor retroactive, but existed at the time it accepted tariff changes showing dual rates and did not disapprove the results of the conference meetings and the tariff revisions by order. *Empire State Highway Transport Assn. v. F. M. B., U. S. A. and American Export Lines, Inc.*, U.S.C.A., D.C. Cir. April 27, 1961.

> "The Board has followed for many years the administrative practice of initiating proceedings and of issuing orders where agreements were to be disapproved under Sec. 15 and where organic agreements and modifications thereof are approved. *Section 15 Inquiry* 1 U.S.S.B. 121 (1927).
>
> "Sec. 15 authorizes the Board to disapprove by order, but not approve by order. All other agreements may simply be approved. Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Sec. 15. *Section 15 Inquiry (supra)*. Other forms of approval by the issue of written statements have been heretofore not been considered a necessary technique of administering the Act. Limitations of staff compelled the use of the technique which was followed. Since the decision in *Isbrandtsen Co., Inc. v. U. S. (supra)* and *River Plate & Brazil Conferences v. Pressed Steel Car Co., Inc.*, 227 F. 2d 60 (2d Cir. 1950), however, new approval procedures have been instituted." Report of the Commission, pp. 14, 15; herein Appendix A, pp. 36-37.

It would seem clear that the Commission in fact approved; what was lacking, if anything, was a formal document or certificate evidencing its approval. As previously noted no such formal document or certificate is ever issued by the Commission. This is quite understandable in view of the provisions of Section 15 of the Shipping Act. Section 15 does not specify any form of procedure on the part of either the parties or the Commission for securing approval of agreements. It provides, insofar as is here material, as follows:

> "The Board may **by order disapprove**, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discrimi-

> natory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and **shall approve** all other agreements, modifications, or cancellations." (Emphasis supplied)

It is clear that although the Congress was specific in directing the manner in which agreements might be **disapproved** (it must be **by order**), it does not specify at all the manner in which such an agreement should be **approved.**

It is submitted that the substance rather than the form of the approval should govern, especially under a statute which leaves all procedural formalities for the giving of approval entirely to the discretion of the administrative agency exercising this function.

C.

Promptly following this Court's decision in *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481, 78 S. Ct. 851 (1958), the Congress, on August 12, 1958, enacted Pub. L. 85-626, 85th Congress, 72 Stat. 574 (for full text see Appendix C) amending the Shipping Act, Section 14, by providing that "nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract agreement in use by the members of a conference on May 19, 1958," reserving to the regulatory agency the power to disapprove, cancel or modify the arrangement in accordance with the standards of Section 15 of the Act. This statute covered the Gulf-Mediterranean contract arrangement on cotton. By successive extensions the statute remained in effect until the enactment on October 3, 1961

of Pub. L. 87-346, 75 Stat. 762, which not only gave validity to contract rate systems previously in use but also to their continued use in the future provided they were amended within six months if necessary to conform to certain specific requirements.

Pub. L. 85-626 was not merely a change in a statute establishing a new concept, right or regulation for future observance. It construed the meaning, intent and effect of language which the Congress had itself used previously in the original statute. It referred to Section 14 of the Shipping Act previously enacted and provided that nothing in the language of that section or elsewhere in the Act "shall be construed or applied to forbid or make unlawful" any dual rate contract arrangement in use by the members of a conference on May 19, 1958.

Support for this conclusion is found in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, on June 8, 1961 (87th Cong., 1st Sess., House of Representatives Report No. 498) interpreting Sec. 14, Third of the Act as amended by Pub. L. 85-626 in 1958, as follows:

> "In view of the grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce, legislation was enacted in the 2d Session of the 85th Congress to authorize the **continuation in force** of any existing dual rate contract arrangement until June 30, 1969." (Emphasis supplied)

In its report dated August 31, 1961 accompanying H.R. 6775 which was enacted by Congress as Pub. L. 87-346, 75 Stat. 762, the Senate Committee on Commerce

referred to the previous acts legalizing dual rate systems in the following language:

> "Congress promptly decided that until it could carefully study conferences and their need to use such contracts, it must insulate them from the effects of that decision. There was little alternative; sudden disruption of international shipping's primary way of doing business to and from the United States being the only real choice."

Under this amendment the Commission still retained jurisdiction to disapprove, cancel or modify a dual rate arrangement if it found it to be not in accordance with the standards set forth in Section 15 of the Act. Thus, an arrangement which the Commission finds to be discriminatory or unfair or to operate to the detriment of the commerce of the United States may be disapproved, cancelled or modified. The Commission clearly had no jurisdiction to do so on any other ground. The function of the Court below was to determine whether the Commission correctly decided the question of legality or illegality. Under this amendment, the Commission, in holding the arrangement legal, could not have decided otherwise. (*Steiner v. Mitchell*, 350 U.S. 247, at p. 253, ff., 76 S. Ct. 330, 100 L. Ed. 267, at p. 272, ff. (1956); *Battaglia v. General Motors Corp.*, 169 F. 2d 254 (2 Cir., 1948), cert. den. 335 U.S. 887. In the latter case, the Court said:

> "This seems plain enough, if we take the view that the claims rested purely on statute up to the time the Portal-to-Portal Act was enacted. Clearly, the general rule is that 'powers derived wholly from a statute are extinguished by its repeal.' *Flanigan v. County of Sierra*, 196 U.S. 553, 560, 25 S. Ct. 314, 315, 49 L. Ed. 597. The Supreme Court, moreover, has told us that rights granted to employees under the Fair Labor Standards Act, have

> a 'private-public character' and has indicated that they are 'charged or colored with the public interest.' See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 709, 65 S. Ct. 895, 903, 89 L. Ed. 1296. Congress has also found that it 'is in the national public interest and for the general welfare, essential to national defense and necessary to aid, protect, and foster commerce' that the Portal-to-Portal Act be enacted. 29 U.S.C.A. § 251 (a). This being true, so long as the claims, if they were purely statutory, had not ripened into final judgment, regardless of whether the activities on which they were based had been performed, they were subject to whatever action Congress might take with respect to them."

The dissenting opinion below (Appendix B, p. 59) reviewed the legislative history of the Act, which makes it clear that during the currency of the statute its application by judicial tribunals, as respects dual rate systems which it covered, was not limited as to time. The dissenting opinion concluded, and we submit correctly:

> "So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems to me that on this record the Board could have done nothing but what it did do."

We submit that the Act was not "prospective only" but that it covered at all times the dual rate systems which fell within the purview of the statute.

Accordingly, Petitioners request that a writ of certiorari issue herein to the United States Court of Appeals for the District of Columbia Circuit, that the decree herein be reversed and that the order of the Federal Maritime Commission be reinstated.

Respectfully submitted,

Jos. M. Rault,

Walter Carroll,

Edward S. Bagley,
Attorneys for Petitioners.

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
Of Counsel.

April 5, 1963.

APPENDIX "A"
Report of the Federal Maritime Commission

(S E R V E D)
(AUGUST 9, 1961)
(FEDERAL MARITIME BOARD)

FEDERAL MARITIME BOARD

No. 726
ISBRANDTSEN CO., INC.
v.
STATES MARINE CORPORATION OF DELAWARE, ET AL.

No. 732
H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733
H. KEMPNER
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734
GALVESTON COTTON COMPANY
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735
TEXAS COTTON INDUSTRIES
v.
LYKES BROS. STEAMSHIP CO., INC., ET AL.

Submitted May 3, 1961 Decided August 4, 1961

Exclusive Patronage Contracts and Dual Rate Systems used by the Far East Conference and by the Gulf-Mediterranean Ports Conference found to be pursuant to agreements filed with the Federal Maritime Board and approved by the Board. The agreements filed by Far East Conference and Gulf-Mediterranean Ports Conference found not to be unjustly discriminatory or unfair as between shippers or carriers, or to operate to the detriment of the commerce of the United States, or to be in violation of Sec. 15 of the Shipping Act, 1916, as amended.

States Marine Corporation of Delaware, a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Waterman SS Corp., a common carrier by water, found to have demanded, charged and collected a rate which is unjustly discriminatory between shippers in violation of Sec. 17 of the Shipping Act, 1916, as amended.

Isbrandtsen Co., Inc., complainant, entitled under Sec. 22 of the Shipping Act, 1916, as amended, to reparation for the injury caused by the violation of said Act by States Marine Corporation of Delaware and Waterman SS Corp. in the amount of $6,687.28.

Isbrandtsen Co., Inc., found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15 and 16 thereof, by the Far East Conference or by any of its members.

Complainants, Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc., shippers, found not to have proven violations of the Shipping Act, 1916, as amended, including Secs. 14, 15, 16 and 17 by the Far East Conference or by the Gulf-Mediterranean Conference or by any of the members thereof.

Motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended

decision to the chief examiner with directions to rule on additional findings denied.

John J. O'Connor and *John J. O'Connor, Jr.* for Isbrandtsen Co., Inc.

Richard W. Kurrus for Isbrandtsen Co., Inc.

Delmar W. Holloman and *Shelby Fitze* for Harris L. Kempner, Trustee, Galveston Cotton Co. and Texas Cotton Industries, Inc.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., Seymour H. Kligler and *Sol D. Bromberg* for Far East Conference and its members, other than Isthmian Steamship Co.

Walter Carroll for Gulf-Mediterranean Ports Conference and its members.

Frank Gormley, Robert B. Hood, Jr., Robert C. Bamford, Edward Aptaker and *Robert E. Mitchell*, Public Counsel.

REPORT OF THE BOARD

Thos. E. Stakem, Chairman; Ralph E. Wilson, Member

By the Board.

1. *Proceedings*

These proceedings involve five complaints of excessive freight charges for the shipment of cotton from Gulf of Mexico ports in 1951, 1952 and 1953.

In Docket No. 726 Isbrandtsen Co. Inc. (Isbrandtsen), as a shipper, complains that the Far East Conference (Far East) and its twenty member and five associate lines violated Secs. 14, 15, 16 and 17 of the Shipping Act,

1916 as amended (Act) by a refusal to carry cotton to Japan either pursuant to an exclusive patronage contract or subject to the lower freight charges applicable to shippers having such a contract. Isbrandtsen also complains that Far East's "system" of requiring an exclusive patronage contract as a prerequisite to lower freight rates had not been filed with the Board and in any event may not be approved by the Board if it is filed. Overcharges by specified carriers on bills of lading "to the prejudice of, and in discrimination against Complainant, and in violation of the Shipping Act, 1916, and other laws of the United States" are charged by Isbrandtsen in Docket No. 726.

In Docket No. 732 Harris L. Kempner, Trustee (Kempner) as a shipper, complains that specified common carriers by water, the Gulf-Mediterranean Ports Conference (Mediterranean) and its members violated the same sections of the Act by a refusal to carry cotton to Italy, Yugoslavia and Spain under similar conditions.

In Docket No. 733 Kempner, as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan, Indo China and the Philippines under similar conditions.

In Docket No. 734 the Galveston Cotton Co. (Galveston Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar conditions.

In Docket No. 735 Texas Cotton Industries Inc. (Texas Cotton) as a shipper, complains that specified common carriers by water, the Far East Conference and

its members violated the same sections of the Act by a refusal to carry cotton to Japan under similar circumstances.

The complaints in Docket Nos. 732, 733, 734 and 735 also alleged that actions complained of "will constitute violations of the Shipping Act and the Sherman Anti-Trust Act". Reparations damages and other relief are asked for by all of the complainants.

At a prehearing conference June 25, 1953, the five separate proceedings were consolidated for hearing on a single record. Docket Nos. 726, 733, 734 and 735 contain complaints against the Far East Conference and its members and Docket No. 732 contains a complaint against the Mediterranean Conference members. An examiner submitted a recommended decision on November 8, 1957. The recommended decision was followed by the submission of exceptions and replies thereto, followed by oral argument before the Board on February 10, 1959. No report was issued in view of pending litigation and Congressional legislation and subsequently two new members of the Board were appointed. The present Board decided to hear oral argument on the existing record prior to making its decision. We heard further oral argument on May 3, 1961.

II. *Facts*

Isbrandtsen's complaint is directed primarily at States Marine Corporation of Delaware (States Marine) and Waterman Steamship Corp. (Waterman), common carriers by water, and members of Far East, to recover $6,687.28 as reparations for excess freight charges in the amount of $4.00 a ton on 6320 bales or about 1,672 short tons of cotton carried to Japan. Far East, since February 1950, has followed the practice of charging shippers

who sign exclusive patronage contracts $4.00 per short ton less than its established tariff rates for shipments of cotton. Isbrandtsen was not a party to an exclusive patronage contract at the time of the shipments in question. Isbrandtsen became a shipper of cotton as the result of its inability to charter a ship to carry cotton which Kempner had booked with Isbrandtsen as a common carrier by water. Isbrandtsen sought to discharge its obligation to Kempner by having the cotton shipped by States Marine and Waterman. The shipments were transported to Japan pursuant to 51 bills of lading showing Isbrandtsen as the shipper and dated from August 3, 1952 to September 18, 1952. Reparations were claimed in the amount of $5,455. from States Marine and $1,232.28 from Waterman. Isbrandtsen paid the freight at non-contract rates:

Kempner's complaint in No. 732 is directed primarily at six common carriers by water, members of Mediterranean, to recover reparations indicated for overcharges on bills of lading as follows:

Lykes Bros. Steamship Co. (Lykes) (26 bills of lading dated from 3-15-51 to 10-27-52)	$6,861.19
Kerr Steamship Company (Kerr) (2 bills of lading dated 12-31-51)	1,836.86
States Marine (22 bills of lading dated from 3-27-51 to 12-15-52)	4,763.99
Societa Italiano de Armamento "SIDARMA" (Sidarma) (10 bills of lading all dated 6-7-51)	1,779,06
Compania Maritima del Nervion (Nervion) (1 bill of lading dated 8-26-52)	1,562.68

Sociata Anonima Navigazione Alta Italia (Creole Line) (17 bills of lading dated from 2-23-51 to 1-29-52)	2,436.78

The cotton was shipped to Italy, Yugoslavia and Spain. Mediterranean charges 25¢, 30¢ and 35¢ per 100 lbs. extra for cotton not shipped pursuant to an exclusive patronage contract.

Kempner's complaint in No. 733 covers a similar cause of action naming the following common carriers by water, and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (69 bills of lading dated 2-15-51 to 12-31-52)	$19,288.66
States Marine (77 bills of lading dated from 2-28-51 to 9-30-52)	12,737.67
Kokusai Lines et al (Kokusai) (12 bills of lading dated 11-13-51 to 9-30-52)	1,860.82
Mitsui Steamship Co. Ltd. (Mitsui) (13 bills of lading dated 11-30-51 to 8-25-52)	2,374.84
Kawasaki Kisen Kaisha, Ltd. (Kawasaki) (1 bill of lading dated 11-15-52)	103.97
Nippon Yusen Kaisha Ltd. (Nippon) (23 bills of lading dated 9-19-51 (to 11-28-52)	4,708.24
Fern-Ville Far East Lines et al (Fern-Ville) (10 bills of lading dated 5-31-52 to 9-9-52)	2,408.23

Galveston Cotton's complaint in No. 734 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (77 bills of lading dated 2-9-51 to 12-31-52)	$8,787.13
Nippon (38 bills of lading dated 9-19-51 to 11-26-52)	4,828.99
Fern-Ville (7 bills of lading dated 5-31-52 to 12-18-52)	1,079.86
Waterman (1 bill of lading dated 7-12-51)	10.17
Kokusai (9 bills of lading dated 11-11-51 to 9-30-52)	1,286.62
Mitsui (12 bills of lading dated 11-30-51 to 7-26-52)	2,290.35
States Marine (90 bills of lading dated 4-30-51 to 11-22-52)	11,483.17

Texas Cotton's complaint in No. 735 covers a similar cause of action naming the following common carriers by water and is for the purpose of recovering the reparations indicated for overcharges on bills of lading as follows:

Lykes (9 bills of lading dated 4-15-52 to 8-4-52)	$1,139.30
Nippon (1 bill of lading dated 11-28-52)	518.86

Fern-Ville (1 bill of lading dated 7-31-52)	311.42
Kokusai (1 bill of lading dated 9-30-52)	106.78
States Marine (3 bills of lading dated 5-27-52 to 8-15-52)	379.64

The carriers in docket Nos. 733, 734 and 735 were members of the Far East Conference.

The Mediterranean Conference is associated pursuant to a contract made on the 28th day of December 1929, first approved by the U.S. Shipping Board on January 23, 1930. It has operated under successive agreements and amendments, the latest of which was approved June 2, 1954 (Agreement No. 134-19). During the period of the actions covered by the complaint Mediterranean was operating under the conference contract as amended and approved to July 21, 1950. The conference contract of Mediterranean has never and does not now contain any provisions expressly authorizing the use of an exclusive patronage contract nor differentials in freight rates for contracting shippers. The record did not contain any minutes of meetings at which the contract and "dual" rate system was formally adopted by Mediterranean but the following two extracts from minutes established the existence of the practice on the dates of the actions referred to in the complaint:

1. *"TUESDAY, JUNE 21, 1949*

10:30 A.M.

E. S. BINNINGS
CHAIRMAN

* * *

CONFERENCE CONTRACTS ON COTTON

Gulf/French Atlantic Hamburg Range Freight Conference

Gulf/Mediterranean Ports Conference

"The Executive Secretary reported, verbally, to the meeting on what transpired since the joint meeting of the Conferences on June 16, 1949, in connection with the Conference contracts on Cotton.

* * *

"Considerable discussion was had and the States Marine Corporation was informed that the Conference Contract System on Cotton, which was unanimously approved by all members of the two Conferences, had already actually been established to become effective as of July 1, 1949, at the request of the Special Committee of the American Cotton Shippers Association, and after careful consideration and study by that Committee and the Cotton Committee of the Conferences.

* * *

"None of the other Member Lines of the Conferences would agree to suspending the contracts, for various reasons, including the fact that the contracts had been definitely announced to commence July 1, 1949 and, at the time of the meeting, more than forty-five (45) shippers had accepted the contracts.

* * *

"This subject was continued on the docket and the meeting recessed, subject to call by the Executive Secretary of the Conferences."

2. "CONFERENCE MEETING OF FEBRUARY 1, 1950" * * *

"Recordation is herein made that the Joint Conference Cotton Contract Committee and the Special Committee of the American Cotton Shippers Association, late in the afternoon of February 1, 1950, agreed on the following which was officially announced on behalf of the Gulf French Atlantic Hamburg Range Freight Conference and the Gulf Mediterranean Ports Conference by the Executive Secretary of those Conferences in a special letter dated Wednesday evening, February 1, 1950, to the Member Lines of the Conferences:

> "Effective as of February 2, 1950, through June 30, 1951, (repeat, nineteen fifty*one*), the date of the bill of lading to govern application of rates, *COTTON*, Basis High Density Bales, contract basis, $1.40 per 100 lbs., (Standard Compressed Bales $1.90 per 100 lbs.) to all ports in the French Atlantic (Bordeaux Dunkirk range), and Antwerp, Ghent, Rotterdam, Amsterdam, Bremen, Hamburg and all Mediterranean Base ports, including Spanish Mediterranean Base ports.
>
> "An addendum, in the form of a letter from the Executive Secretary, to cover this extension of the Conference Cotton Contracts, is being prepared and will be forwarded to all Cotton Contract signers (both shippers and receivers) for their necessary and prompt acceptance.
>
> "All other conditions of the Conference Cotton Contracts (Bordeaux Hamburg range and Mediterranean) remain unchanged."

The record disclosed no denial that Mediterranean followed the practice of offering exclusive patronage contracts and dual rates.

Far East is an association of common carriers by water in the foreign commerce of the United States act-

ing pursuant to a "Memorandum of Agreement" made between the parties signatory on the first day of September 1922, approved by the U.S. Shipping Board on November 14, 1922 (Agreement No. 17). At the times referred to in the complaints Far East was operating under such agreement as amended and approved through September 7, 1951. The contract contains no provisions expressly authorizing the use of an exclusive patronage contract or differentials in freight rates for contracting shippers.

Prior to the association evidenced by the 1922 memorandum of agreement, an agreement was reached in a conference of representatives of steamship lines and a representative of the U.S. Shipping Board Emergency Fleet Corporation at meetings on April 12 and April 19, 1920 concerning the obligations of carriers to each other with respect to their operations between North Atlantic ports in the U.S. and the Far East. The transcript of the minutes is the only evidence of the agreement. The minutes of the meeting refer to the assemblage as "Conference No. 17". At that time the carriers were all companies acting as managing agents of ships operated by the U.S. Shipping Board Emergency Fleet Corporation. A letter dated May 5, 1920 "relative to legality of the conferences" signed by the "Examiner in Charge, DIVISION OF REGULATIONS" of the Shipping Board refers to the transcript of minutes as follows:

> " * * * An examination of these papers does not disclose any objectionable features, they will be accepted and filed under Sec. 15 of the Federal Shipping Act and may be regarded as tentatively approved. Proceedings within the scope of this Conference as outlined in these papers will be lawful unless you shall be hereafter notified to the contrary.

"I note that you will arrange to forward to this office copies of future minutes, agreements, tariffs and rates as may be authorized by the Conference. * * * "

The record does not contain any further directives by the government concerning the filing of transcripts of minutes but the practice of submitting such papers to the government appears to have been followed thereafter. The Board's General Order No. 76, promulgated November 1952, however, requires filing of statements concerning the initiation of dual rate-contract arrangements by carriers. (See also *Sec. 15 Inquiry* 1 U.S.S.B. 121 (1927))

At the conclusion of hostilities in World War II cotton freight rates were controlled by a government agency until 1949 when commercial shipments of cotton were resumed but there was no offer of a rate differential until 1950.

The transcript of an extract from the minutes of a special meeting of Far East held on February 16, 1950 contains a statement that "This Special Meeting was called to hear further report of Conference Counsel with respect to Cotton contracts" and the following:

"On the question as to whether or not the Conference should proceed with the contract on Cotton, upon Motion seconded and carried it was unanimously agreed that the Chairman be instructed to mail the contract to the Cotton Shippers for their signature."

Special rate differentials for cotton shipped pursuant to exclusive patronage contracts are first evidenced by a routine tariff revision effective as of February 7, 1950 approved at a meeting on February 14, 1950 which was followed by the February 16 action noted above relative

to the issue of a contract to put the dual rate into effect.

Minutes of Conference meetings are reduced to writing and copies have been transmitted to the Federal Maritime Board or its predecessor agencies. Standard Board practice is to review these documents and, if action believed to be contrary to law is shown, to make the matter a subject of official correspondence or of formal proceedings. If no illegal actions are shown, the papers are filed and no further administrative action is taken. A transcript of minutes showing the action of Far East in extending its contract rate practice to include cotton was filed with the Board.

No minutes or memorandum or other evidence of any agreement to revise, rescind or revoke the foregoing action by either Conference had been filed with the Board by January 1, 1953.

Isbrandtsen (in No. 726) signed a "Memorandum of Agreement" made the 10th day of January 1946 with Far East and member carriers agreeing "in consideration of the rates and other conditions stated * * * to forward by vessels of the Carriers all shipments * * * to ports in Japan". Far East under date of October 1, 1948 sent contract shippers including Isbrandtsen proposed "Amendments to Conference Freight Contract" with the condition that "if you should omit to accept this proposal on or before November 1, 1948, we shall * * * terminate this agreement effective December 1, 1948 * * *." Isbrandtsen omitted to accept the proposal. No new agreement was made covering the period of the bills of lading in evidence. Isbrandtsen asked Far East for a contract for its August 1952 shipments but the Conference representative advised it would not permit Isbrandtsen to sign a contract to cover these shipments and States Marine

advised that even if Isbrandtsen obtained a freight contract, States Marine would not carry the cotton Isbrandtsen tendered.

Kempner (in No. 732) signed a "Memorandum of Agreement" made the 12th day of July 1949 with Mediterranean and member carriers agreeing "in consideration of the rates and other conditions stated * * * to offer * * * to the Carriers for transportation by them to all ports * * * served on the Mediterranean Sea * * * *". On May 16, 1950 Kempner was alleged to have shipped cotton on a non-conference ship and thereby to have failed to offer his cargo to the member carriers. After an exchange of telegrams and correspondence, beginning June 27, 1950, regarding this failure, Mediterranean by letter dated July 14, 1950 assessed damages pursuant to the agreement in the amount of $6,010.20, against Kempner and advised that failure to pay in 30 days would be cause for termination of Kempner's right to "contract rates" until paid as provided in the agreement. On July 27, 1950 Mediterranean advised Kempner that "the 'non-contract' basis of rates will be applicable effective on and after August 17, 1950". Kempner did not pay the damages assessed against it and has paid non-contract rates since August 17, 1950.

Kempner (in No. 733) signed a "Memorandum of Agreement" made the 7th day of February 1950 with Far East and member carriers designating therein under its signature as "Subsidiary, Associated and or Parent Companies" Galveston Cotton Company and agreeing "in consideration of the rates and other conditions stated * * * to forward by vessels of the Carriers all shipments made * * * to ports in Japan". By letter dated September 25, 1950 Kempner wrote Far East "we herewith tender our resignation from the Far East Conference

Agreement". The agreement provides that it "may be terminated upon 90 days written notice by the Shipper" (Kempner). The "resignation" was construed as a "termination" by the parties effective December 24, 1950. No new agreement was made covering the period of the bills of lading in evidence.

Neither Galveston (in No. 734) nor Texas Cotton (in No. 735) is a party in its own name to an exclusive patronage contract with either Far East or Mediterranean. Galveston is a Texas Corporation which is a wholly owned subsidiary of H. Kempner, a Massachusetts Trust. Texas Cotton is a Texas corporation and 50% of its stock is owned by H. Kempner.

Kempner never asked for a new shippers' contract and until this action never claimed a right to ship at contract rates.

On the dates of all the shipments forming the basis of complaints herein, no other adequate means were available to complainants to transport the shipments of cotton.

The differential between tariff rates for persons having exclusive patronage contracts for the transportation of cotton by Far East members and for those not having such contracts was $4.00 per ton and by Mediterranean carrier members was 20%.

Far East Conference carriers had however allowed shipments of other commodities by Isbrandtsen between New York and Japan at contract rates for a period of time immediately preceding August 1952. Such contract rates were extended to Isbrandtsen even though it was not a party to a shipper's exclusive patronage contract.

On the ships which carried Isbrandtsen's cotton at non contract rates, in August and September 1952, all of

the other cotton on board was carried at contract rates. During the period in question, the conference lines also shipped cotton for "spot" cotton brokers and forwarders at contract rates and considered such persons as shippers even though they did not own the cotton they shipped.

Isbrandtsen paid $13,373.96, the difference between the rate Kempner paid Isbrandtsen and the non contract rate paid by Isbrandtsen for shipping Kempner's cotton. Isbrandtsen did not pass on to the buyer the extra freight paid to the conference lines.

The following is a summary of outside competition met by conference lines in the Gulf-Far East trade during the period 1949-1955: In 1949, 4 non-conference liner sailings and 34 tramp sailings; in 1950, 15 non-conference liner sailings, and 29 tramp sailings; in 1951, a non-conference liner sailing applying conference contract rates, and 38 tramp sailings; in 1952, 54 tramp sailings; in 1953, 5 non-conference liner sailings, and 68 tramp sailings; in 1954, one non-conference liner sailing, and 77 tramp sailings; and in 1955, 61 tramp sailings.

Discussion

The complainants in all five of these proceedings seek to have the "dual rate contract arrangement" in use by Far East and Mediterranean made illegal under the Act.

The complainants after alleging the use of "dual rate, contract non-contract system" in the Far East and Mediterranean trades state that such system is unlawful for the following reasons: 1. the use of the system contravenes the provisions of Sec. 14 of the Act; 2. the use of the form of shipper's contract and of rate differentials in the tariffs of the conferences has never been approved by the Board under Sec. 15 of the Act and may not be

approved under Sec. 15; 3. the system and the dual rates used are unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act; and 4. the system (this term is used herein interchangeably with "arrangement") and the dual rates used are unjustly discriminatory between shippers and are unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act.

If the arrangements have been agreed to by common carriers by water and thereafter carried out in whole or in part without Board approval, the arrangements are illegal for this reason under Sec. 15 and for no other reason. If the arrangements embodied in agreements have been approved by the Board, on the other hand, it cannot be argued here that the arrangements are illegal unless a court has interpreted the Act to say so, notwithstanding the Board's approval. If any Court has done so, we hold as hereinafter noted, that Sec. 14 of the Act restricts our authority to construe or apply the Act to make unlawful any dual rate contract arrangement in use on May 19, 1958. (The "arrangement" or "system" referred to herein consists of conference action to (1) adopt and tender to shippers an exclusive patronage contract and (2) issue tariffs containing rate differentials for contracting shippers.)

The procedure by which agreements between carriers are declared legal or illegal under the Act is that they be 1. filed with the Board pursuant to Sec. 15; 2. reviewed; and 3. passed on for legality. There is no filing requirement until there is an agreement or a meeting of minds by two or more common carriers by water or other persons subject to the Act regarding activities described in Sec. 15. Until common carriers by water or other persons subject to the Act agree to put rate differentials

into effect and to tender shippers exclusive patronage contracts, the so-called "arrangement" is a trade practice or simply a part of the commercial environment in which common carriers by water and other persons subject to the Act operate. The trade practice must be distinguished from agreements. The "arrangement" is put into effect through agreements, commodity by commodity, as the needs of the trade appear to dictate. In the present case the cotton shippers wanted a contract and the conference, as the minutes herein show, put the arrangement into effect by the actions at conference meetings. Agreements came into being at the time the common carriers by water which are members of Far East and Mediterranean agreed to offer cotton shippers rate differentials by means of tariff revisions and to tender them exclusive patronage contracts. Complainants, in effect, challenged the validity of the actions evidenced by the meetings of Far East on February 16, 1950, and of Mediterranean on February 1, 1950, when they assert the unlawfulness of the "dual rate exclusive patronage contract." If the agreements reached at these meetings violate any provision of the Act or operate to the detriment of the commerce of the United States or are unjustly discriminatory or unfair as between carriers and shippers they may be disapproved by the Board. If the "practice", "system" or "arrangement" resulting from these agreements violates any provision of the Act the Board may also award complainants reparations under Sec. 22 for the injury, if any, caused by the violation.

The facts showing that Mediterranean filed and obtained Board approval of a conference contract and filed transcripts of minutes of its meetings showing agreement among its members for the adoption of the practice of offering dual rates and exclusive patronage contracts

and filed tariffs containing dual rate provisions establishes that Mediterranean has filed an agreement pursuant to Sec. 15. The fact that Far East also filed transcripts of extracts from the minutes of its meetings showing adoption of the practice of offering dual rates and exclusive patronage contracts for cotton shippers as well as the filing of tariffs showing dual rates established that Far East filed its agreements pursuant to Sec. 15. These transcripts have been reviewed by the Board's staff and no exception taken thereto. Board approval of both agreements is required, *Isbrandtsen Co. Inc. v. U. S.*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954), and approval has been given. The Board's approval was neither subsequent nor retroactive, but existed at the time it accepted tariff changes showing dual rates and did not disapprove the results of the conference meetings and the tariff revisions by order. *Empire State Highway Transport Assn. v. F.M.B., U.S.A. and American Export Lines, Inc.*, U.S.C.A., D.C. Cir. April 27, 1961.

The Board has followed for many years the administrative practice of initiating proceedings and of issuing orders where agreements were to be disapproved under Sec. 15 and where organic agreements and modifications thereof are approved. *Section 15 Inquiry* 1 U.S.S.B. 121 (1927).

Sec. 15 authorizes the Board to disapprove by order, but not approve by order. All other agreements may simply be approved. Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Sec. 15. *Section 15 Inquiry* (*supra*). Other forms of approval by the issue of written statements have heretofore not been considered a necessary technique of administering the Act. Limitations of staff compelled

the use of the technique which was followed. Since the decision in *Isbrandtsen Co. Inc. v. U. S.* (*supra*) and *River Plate & Brazil Conferences v. Pressed Steel Car Co. Inc.*, 227 F. 2d 60 (2d Cir. 1950), however, new approval procedures have been instituted.

The purpose of filing agreements under Sec. 15 of the Act is to give the Board the opportunity to review the agreements to determine their conformity with the standards specified in Sec. 15. The complaint is that such a review will show the agreement to use the dual rate exclusive patronage contract system by common carriers by water does not conform; and particularly that it violates Sec. 14 of the Act. This contention has been reviewed in the past by the courts in several cases, but none of the cases declare the practice or system unauthorized under all circumstances. In *U. S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), the plaintiff sought to enjoin the defendant steamship lines from using the contract rate system on the ground that such practice violated the Sherman Anti-Trust Act, C. 647, 26 Stat. 209, Title 15, U.S.C. §§ 1-7 and the Clayton Act, C. 323, 38 Stat. 730, Title 15, U.S.C. §§ 12-27. The decree dismissing the bill of complaint was affirmed on the ground that the Act covers the dominant facts alleged as constituting a violation of the Anti-Trust Acts, particularly Sec. 14 of the Act which prohibits retaliation by common carriers by water against a shipper by resorting to discriminating or unfair methods. If the system were illegal under any circumstances, the dismissal because of the Board's primary jurisdiction would have been a useless action and the court should have passed on the issue then and there. The case of *Swayne & Hoyt Ltd. v. U. S.*, 300 U.S. 297 (1937) involved an appeal from an order of the Secretary of Commerce. The Secretary's order had

enjoined the use of the exclusive patronage contract rate system in the intercoastal trade on the ground that, as he interpreted the evidence, the operation of the contract system in the circumstances of the case would not differ substantially from the deferred rebate system outlawed in both foreign and coastwise shipping by Sec. 14 of the Act. This case is not authority for the conclusion that any contract rate system is unlawful. The court said: "Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable." (P. 307.) Unreasonable discrimination, not illegality under any circumstance, was the basis of the decision.

In *Isbrandtsen Co. v. United States*, 96 F. Supp. 883 (U.S. D.C. So. Dist. N.Y.) (1951) Aff'd Sup. Ct. 342 U.S. 950 per curiam (1952) the facts showed that the North Atlantic Continental Freight Conference on October 1, 1948, "sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract-noncontract rate system would be inaugurated and that shippers who refused to enter into contracts to ship with the conference lines exclusively when they could provide transportation were to be charged 20% to 30% higher than the contract rates." The Board by its order of December 1, 1950 (3 F.M.B. 235) dismissed a complaint alleging illegality in such action. The plaintiff Isbrandtsen, the Attorney General and the Secretary of Agriculture joined in contending "that in no circumstances can a dual rate provision (i.e., exclusive patronage, or dual rate, or contract-noncontract provision) in a conference agreement be valid" under Sec. 14. The court said "for the purposes of this decision we assume that, as the Board contends, under some circum-

stances the Board may, pursuant to 46 U.S.C.A. § 814 approve a conference agreement containing such a provision." The court however set aside the Board's order and enjoined the conference from acting pursuant to the dual rate provision on the ground that the 20% to 30% differential in rates had been arbitrarily selected and decided that the Board itself made the examiner's finding to this effect its own. The case was appealed to the Supreme Court which affirmed the decision of the District Court without opinion in *A/S.J. Ludwig Mowinckels Redeir. v. Isbrandtsen Co.*, 342 U.S. 950, (1952). In *Far East Conference v. United States*, 342 U.S. 570 (1952) the Attorney General brought a suit under the Sherman Anti-Trust Act (*Supra*) to enjoin defendants from using the exclusive patronage contract rate system. The important distinction between this case and the *Cunard* case above was that now the government rather than a private shipper was seeking to enjoin the maintenance of dual rates. This fact was held to be immaterial and since the Board was the expert agency responsible for administering the Act, the court held that administrative remedies before the Board must be exhausted before resort may be had before the courts. Here again the court declined to hold that the contract rate system was unlawful under any circumstances.

Up to this point we do not construe any of these decisions as outlawing the trade practice of common carriers by water agreeing to tender shippers exclusive patronage contracts which provide for less than tariff rates and of issuing tariffs containing rate differentials for shippers having exclusive patronage contracts. We construe the present status of the law as follows: 1. where an issue as to the validity of agreements among common carriers by water to use exclusive patronage contracts and dual rates is concerned, the complaint and facts must

first be presented ot the Board for decision; 2. where we find the operation of an exclusive patronage dual rate system has the effect of creating deferred rebates or unreasonable discrimination, we must hold the agreement to maintain the system is unlawful; 3. dual rate differentials which are arbitrarily selected must be held invalid; and 4. a dual rate system which is agreed to for the purpose of curtailing competition and an agreement to offer an exclusive patronage contract containing provisions tying shippers in such a way as to have the effect of stifling outside competition must both be held unlawful.

Finally on May 19, 1958, the Supreme Court in *Maritime Board v Isbrandtsen Co. Inc.*, 356 U.S. 481 (1958) passed on the issue of illegality under all circumstances. Isbrandtsen filed a petition to review an order of the Board in Docket No. 730 *Contract-Rates-Japan/Atlantic-Gulf Freight Conference*, 4 F.M.B. 706 (1955) that the agreement embodied in a statement filed by the Conference be approved under Sec. 15 of the Act. The Conference's statement proposed to initiate an exclusive patronage contract/non-contract freight rate system (dual rate system) in the trade from Japan, Korea and Okinawa to U. S. Gulf Ports and Atlantic Coast Ports. The Court held: "In view of the fact that in the present case the dual-rate system was instituted for the purpose of curtailing Isbrandtsen's competition, thus becoming a device made illegal by Congress in § 14 Third, we need not give controlling weight to the various treatments of dual rates by the Board under different circumstances." The Court had stated that: "Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine." The cir-

cumstances here were that the conference was trying to stifle outside competition.

Our approval of the Mediterranean and Far East conference agreements and of their subsequent agreements to initiate the exclusive patronage contract dual rate system to the carriage of cotton, and the consistency of such approval with court decisions has been noted above. The main question now is whether our former approval must be revised as a result of the last Isbrandtsen decision.

The complainants' claim is that we now lack authority to approve a dual rate system because Sec. 14 Third provides that no common carrier by water shall "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

The Circuit Court had stated "since the dual rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates." *Isbrandtsen Co. Inc. v. United States*, 239 F. 2d 933 (U.S.C.A., D.C. 1956), Cert. granted 353 U.S. 908 (1957). The Supreme Court affirmed the result which was to set aside the Board's orders "insofar as they approve the exclusive patronage contract non-contract rate system" of the Japan-Atlantic & Gulf Freight Conference, but for different reasons it held that Sec. 14 Third "strikes down dual-rate systems only where they are employed as predatory devices", and precise findings by the Board "as to a particular system's intent and effect" are essential to a judicial determination of a system's validity under the statute. *Isbrandtsen* at p. 499.

We are called on to make precise findings as to the intent and effect of the arrangement as a result of the *Isbrandtsen* decision, and of respondents' (Far East) motion to remand the record and the recommended decision filed November 3, 1958 after the *Isbrandtsen* decision, to decide whether the arrangement should now be disapproved as a result of the findings herein about the system's intent and effect and to decide whether our former approval should be revoked.

On August 12, 1958, Congress enacted P.L. 85-626, 72 Stat. 574 "amending the section of the Shipping Act on which the *Isbrandtsen* decision was based, [Sec. 14] so as to hold valid any dual rate contract arrangement in use by the members of a Conference on May 19, 1958" *Anglo Canadian Shipping Co. Ltd. et al v. United States*, 264 F. 2d 405 (U.S.C.A. 9th, February 18, 1959).

Before discussing the effect of P.L. 85-626 and the amendment of Sec. 14 Third on complainants' claims, on the precise findings required and on the Isbrandtsen decisions a short summary of the history of the trade practice and of agreements relating to exclusive patronage contracts and dual rates will throw some light on the retaliatory, predatory and discriminatory aspects of the arrangement and on its intent and effect.

Steamship freight conferences came into being in 1875 to provide regular services and fixed rates of freight which were the same to all shippers. In return for regular service and stable rates, the associated steamship lines sought assurances from shippers of their exclusive support for all members of the conference. Shippers supporting the conferences also sought preferential freight rates over those who did not. The assurances of support took two forms: the deferred rebate system and the con-

tract system and rate differential. Under the deferred rebate system, shippers who confined their shipments to conference lines for stated periods can claim a rebate at the end of each period measured as a percentage of the freight paid and payable at a later date. Under the contract system shippers are required to sign a contract in advance and to confine all their shipments to conference lines. In return they either receive a discount on freight rates or else lower rates of freight than non-contractors. Penalties are usually prescribed for violation of the contract.

Two significant conclusions emerge from this summary: first, the use of exclusive patronage contracts providing for less than tariff rates was an established trade practice long before the Act, in 1916, and existed at the time of the Act, and, second, the trade practice was brought about principally in response to demands of shippers rather than as a result of conference efforts to improve the members' competitive position vis-a-vis outsiders. The intent and effect of the dual rate contract traditionally is not to meet outside competition. The conference agreements between carriers may have been designed to regulate competition, but not the exclusive patronage contract between carriers and shippers nor the differential in freight rates which the contract provided. The carrier-shipper relation is the only one involved here. The inter-carrier relation was involved in the Isbrandtsen case.

The trade practice of requiring a shipper tie to a conference by means of the contract and rate differentials for contracting shippers is what has come to be known as a "contract system" or as the "dual rate system" or the "exclusive patronage dual rate contract noncontract system" or a "dual rate contract arrangement".

Since this trade practice was so well known in American and British ocean commerce by 1916, it would have been anomalous for Congress in 1916 to outlaw the system by inference rather than expressly as it did in the case of rebates.

Since 1916 the public policy aspects of shippers' contracts and rate differentials as trade practices have not been successfully challenged. Certain aspects of the arrangement such as excessive rate differentials have been invalidated because they were "arbitrarily" selected *A/S J. Ludwig Mowinckels Redeir v. Isbrandtsen Co.* (*Supra*) or were undue or unreasonable *Swayne and Hoyt Ltd. v. United States* (*Supra*); the administrative procedures or formality of approval under Sec. 15 have been declared improper, *River Plate & Brazil Conference v. Pressed Steel Car Co. Inc.* (*Supra*) and the U.S. Shipping Board has condemned the arrangement where it operates solely to effect a monopoly *Eden Mining Co. v. Bluefields Fruit SS Co.*, 1 U.S.S.B. 41 (1922) but the trade practice itself had never been declared invalid "per se" until the Circuit Court of Appeals said so in the *Isbrandtsen* case (239 F. 2d 933) in 1956. This unqualified holding however does not appear to us to have been fully sustained by the Supreme Court in 1958.

We are inclined to believe that the latest *Isbrandtsen* case did not affirm that part of the Circuit Court decision (239 F. 2d 933) which set aside the Board's orders "in so far as they approve the exclusive patronage contract non-contract rate system" as a general proposition, but affirmed such decision only to the extent of disapproving the Japan-Atlantic and Gulf Freight Conference arrangement which used the particular shippers' contract to injure the plaintiff, an independent common carrier by water.

Up to this point and until 1958, a period of about 83 years following the formation of the first shipping conference in 1875, the shippers' exclusive patronage contract and rate differentials have survived legislative inquiry and judicial scrutiny in both Great Britain and America without being found to be a retaliatory device and as such sufficiently contrary to public policy to justify remedial legislation or adverse court orders.

In 1958, in the *Isbrandtsen* case, the Supreme Court concluded, on the premise of our finding the dual rate contract of the Japan-Atlantic and Gulf Freight Conference was a necessary competitive means to offset the effect of Isbrandtsen's non-conference competition, that the arrangement was a resort to other discriminatory or unfair methods in violation of Sec. 14 Third of the Act.

Notwithstanding 1. the special facts of the present case showing there have been no unjustified reductions in freight rates (i.e. "rate cutting"), 2. the fact that shippers, and not carriers, are complainants herein, and 3. the absence of significant independent liner competition for cotton out of the Gulf since World War II, all of which alter the premises herein, the complainants and respondents adopted differing views about the effect of the *Isbrandtsen* decision.

Insofar as the decision invalidated practices heretofore generally used for over 83 years in the seaborne foreign commerce of the U.S., it had a profound effect upon the industry and action by Congress followed. The cause for Congressional action was stated in the report of the Senate Committee on Interstate and Foreign Commerce to accompany S. 3916 (Report 1709, Senate, 85th Cong., 2d Sess.) as follows: "Whether the above language from the Court's opinion would justify operation of a dual-

rate system if it is not directed at a non-conference competitor or competitors, or whether, as Justice Frankfurter construed it in a dissenting opinion, it declares illegal all dual-rate systems, is certainly not clear. About the only point rendered unmistakably clear by the two opinions is that, as a result of the Court's decision, the shipping industry is likely to be plagued with widespread confusion and endless litigation over the months, and possibly years, ahead."

After the Supreme Court decision on May 19, 1958, and the Committee's Report on June 13, 1958, Congress enacted Public Law 85-626 (72 Stat. 574) which, as amended by Public Law 86-542 (74 Stat. 253), and by Public Law 87-75 (75 Stat. 195), amended Sec. 14 Third of the Act to provide that nothing in the Act "shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958 which conference is organized under an agreement approved under section 15 of this Act" by the Board unless and until the Board disapproves or modifies the arrangement in accordance with the standards of Sec. 15 of the Act. This amendment is in effect until September 15, 1961.

The Committee's action put a stop to litigation over the effect of the *Isbrandtsen* decision, but in its place, litigation began over the interpretation of the amendment of Sec. 14 Third of the Act. The New York Supreme Court in *Pasch v. Chemoleum Corp.*, 209 N.Y. Supp. 191 (N. Y. Sup. Ct. Oct. 11, 1960) had the following to say about the effect of the amendment:

"The legislative history of this amendment makes plain the intention of Congress, by this legislation, to provide the industry with a moratorium during which

Congress might study and investigate, to the end that appropriate legislation might thereafter be enacted. Petitioner asserts the amendment preserves the validity of the dual rate contracts now under consideration. Respondents argue to the contrary and contend the amendment was intended to do no more than preserve the status quo that had been disturbed by the adjudication of the Supreme Court of the United States in the later *Isbrandtsen* case; that it was not the intention of Congress to limit the effects of the adjudication in the earlier *Isbrandtsen* case, and, as a consequence, the amendment must be deemed to include the qualification that exclusive patronage-dual rate contracts must, in any event, have been approved by the Federal Maritime Board to acquire validity.

"I reach a different conclusion. Respondents' contention as to the meaning of the amendment works a distortion in the language employed by Congress which plainly states * * * unless and until such regulatory body disapproves, cancels or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. It would have been a simple matter for Congress, if it desired to do so, to insert appropriate language in the amendment limiting the validity of the dual rate contracts to those actually approved by the Board. It is incredible to assume that Congress was wholly unaware of the earlier *Isbrandtsen* case when it enacted the legislation. I conclude Congress neither intended nor desired to limit the effect of the amendment in the manner suggested by respondents."

Later the following on this case was stated by Justice McGivern in *Pasch v. Chemoleum Corporation*, 210 N.Y.S. 2d 738 (1960) before the Appeals Division of the Supreme Court:

"In any event, any infirmity which may have existed in the contract was cured by the enactment on August 12, 1958, of Public Law 85-626 (72 Stat. 574) which amended section 14 of the Shipping Act (46 U.S.C. 812).

"The dual rate contract arrangement of petitioner was in existence on May 19, 1958, and it is conceded that the conference was one organized under an agreement approved under section 15 of the Shipping Act by the regulatory body administering the act. Under the circumstances, in the absence of any evidence that the regulatory body has disapproved, canceled, or modified the dual rate contract form theretofore filed with it on February 26, 1953, by petitioner in compliance with the regulatory body's General Order 76, directing it to supply complete information as to the dual rate contract arrangement then in force, this court must find the contract executed by petitioner and respondent valid." (P. 742).

More recent support for this conclusion is found in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, on June 8, 1961 (87th Cong. 1st Sess. House of Representatives, Report No. 498) interpreting Sec. 14 Third of the Act as amended by P.L. 85-626 in 1958 and P.L. 86-542 in 1959, as follows:

"In view of the grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce, legislation was enacted in the 2d session of the 85th Congress to authorize the *continuation in force* of any existing dual rate contract arrangement until June 30, 1960." (emphasis supplied).

The arrangement of Far East and Mediterranean

was in use by members of the Conference on May 19, 1958. The Conferences were organized under agreements approved under Sec. 15 of the Act. Sec. 15 requires an order if the Board is to disapprove an agreement. The standards for determining the lawfulness of an arrangement set forth in Sec. 15 are: 1. is the arrangement unjustly discriminatory or unfair as between shippers and carriers; 2. does the arrangement operate to the detriment of the commerce of the U. S.; and 3. is the arrangement in violation of the Act?

We have found that the arrangements of Mediterranean and Far East are embodied in arrangements heretofore approved by the Board and in use by the members of the conferences on May 19, 1958. The question now is whether we should disapprove or modify these arrangements by revoking our prior approval.

On the present record no independent common carrier by water is complaining of the retaliatory or predatory effect of the arrangement. Instead, as shown in complainant's memorandum, in recent oral argument before us and in the exceptions and replies filed after the Isbrandtsen decision, it is argued by a group of shippers that the historically established trade practices are contrary to public policy and were outlawed by Congress in Sec. 14 of the Act. The Supreme Court, however, only found that the arrangement of the Japan-Atlantic and Gulf Freight Conference used the shippers' contract and its dual rates as a predatory device and as evidence thereof referred to a shippers' exclusive patronage contract containing oppressive conditions. The Court stated: " * * * the dual-rate contracts here require the carriers to carry the shipper's cargo only 'so far as their regular services are available'; rates are 'subject to reasonable increase' within two calendar months plus the unexpired

portion of the month after notice of increase is given; '[e]ach Member of the Conference is responsible for its own part only in this Agreement'; the agreement is terminable by either party on three months' notice; and for a breach, 'the Shipper shall pay as liquidated damages to the Carriers fifty per centum (50%) of the amount of freight which the Shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect.' Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and the denial of another until all liquidated damages have been paid in full." The shippers' contracts in this record are similar to the shippers' contracts before the Supreme Court.

Because of this similarity with the contracts in this record and the Court's inference therefrom that such an oppressive contract plus a dual rate system constitutes a predatory device, it is argued that we should hold that the actions of Mediterranean and Far East violate Sec. 14 although as far as this record is concerned there is no evidence whatever that the carrier's actions in adopting the shippers' contract and the dual rate was directed at any other carrier.

The circumstances of this case are that the shippers' contract was asked for by the shippers themselves. The contract was not adopted as an anti-outside-carrier device but as an accommodation to shippers desiring stable conditions in the trade which would give them assured service at reasonably firm and level rates for predictable periods. We find no evidence in this record to show that the drafting and tender of the shippers' contract or that the rate differential established in the published and filed tariffs

was a competitive device, was designed to stifle outside competition or even had this effect. No carrier introduced any evidence to this effect.

The absence of substantial non-conference liner competition and the absence of any complaint by carriers in independent non-conference liner service and the circumstances under which cotton shippers negotiated the exclusive patronage contracts, lead us to conclude that the arrangement herein was not unjustly discriminatory or unfair between shippers and carriers, was not retaliatory, did not stifle outside carrier competition and does not violate the Act.

The examiner has found that the differentials in rates of each conference are not discriminatory or unfair or detrimental to the commerce of the U. S. or in violation of the Act. We have reviewed the record of the facts on which this finding is based, have no disagreement therewith and concur with the examiner's finding.

In view of the history of the exclusive patronage contract and rate differential arrangements, we conclude that such arrangement does not operate to the detriment of the commerce of the U. S. We conclude further that the dual rate and exclusive patronage contract herein was not a resort to other discriminatory or unfair methods against the shipper complainants herein in violation of Sec. 14 of the Act. We find no reason to disapprove the agreements of Far East and Mediterranean heretofore filed with the Board.

We conclude further that "system and rates thereunder" are not unduly and unreasonably prejudicial and disadvantageous to persons in violation of Sec. 16 of the Act and are not unjustly discriminatory between shippers

and unjustly prejudicial to exporters of the United States in violation of Sec. 17 of the Act as claimed in respondents' complaints.

The complainants also asked for reparations based on violations of the Act.

The facts showing that APL, East Asiatic, Maersk and NYK gave Isbrandtsen the lower contract rates without the necessity for a contract and then in August and September other conference members demanded the payment of non-contract rates established that Isbrandtsen was discriminated against by States Marine and Waterman in violation of Sec. 17 of the Act. Sec. 17 forbids any common carrier by water in foreign commerce from charging any rate which is unjustly discriminatory between shippers. States Marine and Waterman as members of Far East failed to extend to Isbrandtsen the same rates which other conference members had granted earlier.

Respondents claim that Isbrandtsen is not a shipper and therefore cannot claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as the shipper on the bills of lading in evidence, signed by the masters of respondent's ships, the cargo described thereon was taken aboard and transported and Isbrandtsen's freight payments as shipper were accepted. Isbrandsten's name also appears on all other shipping documents. As a shipper Isbrandtsen tried to get a contract and contract rates but was refused both. At the same time, States Marine and Waterman were carrying the same kind of cotton for other shippers at contract rates, under identical conditions. States Marine and Waterman refused to give Isbrandtsen similar rates. As a result of these actions, Isbrandtsen was charged a rate which was unjustly discriminatory between shippers. Isbrandtsen showed further that it incurred expenses, lost profits and

suffered damage to the extent of its out-of-pocket expenses at the result of the denial of a contract and payment of the higher rates. *Eden Mining v. Bluefields* at 1 U.S.S.B. 41 (1922). Respondents did not prove any mitigating factors affecting Isbrandtsen's damage although the burden was on them to do so. *Roberto Hernandez Inc. v. Arnold Bernstein, Etc.*, 116 F. 2d 849 (C.C.A. 2d 1941 cert. den. 313 U.S. 582 (1941).

Kempner and Galveston signed a shippers' contract on February 7, 1950, and terminated their contract September 25, 1950, effective 90 days later on December 24, 1950, as shown. Unlike Isbrandtsen, no new contract was requested. These respondents were never unjustly refused a contract rate. Consequently, for shipments made during and after January 1951, Kempner and Galveston could not claim status as contract shippers and were not discriminated against. Kempner and Galveston were not given the lower contract rates during any period when they did not have a contract.

Texas Cotton never had a shippers' contract with either Mediterranean or Far East. Kempner in the only Far East shippers' contract it had did not list Texas Cotton as a subsidiary, affiliate or parent company. No contract existed at any time on which Texas Cotton either assumed the obligations to patronize the conference exclusively or acquired the right to ship at the lower contract rates either independently or as a subsidiary. This respondent was never unjustly refused a contract rate.

Since none of the complainants in Dockets No. 732, 733, 734 and 735 could validly claim status as contract shippers, nor even received contract shippers' rates during a period when they did not have a contract, there has been no discrimination against such complainants.

Isbrandtsen's claim for reparations under Sec. 22 of the Act has been found to be the result of discrimination. We have recently held that "over-charges and discriminations have quite different consequences as far as reparation is concerned. A different measure of recovery applies where the shipper has paid the applicable rate (non contract) and sues upon the discrimination caused by other shippers having to pay less or by being unjustly refused the contract rate." *Swift & Co. and Swift & Co. Packers v. Gulf & South Atlantic, Havana SS Co. et al.*, 6 F.M.B. , decided February 2, 1961. In the *Swift* case the complainant was given the opportunity to prove its damages at a further hearing. Although the basis for the decisions are the same, such further proceeding is not necessary here because Isbrandtsen has only asked for the sum of $5,455, with interest, from respondent States Marine Corp. of Delaware and $1,232.28, with interest, from the respondent Waterman SS Corp. In the *Swift* case complainants had asked for reparations and other relief as a result of the damage suffered from the enforcement by the conference of certain contract provisions against Swift. Accordingly, States Marine and Waterman will be ordered to pay to complainant Isbrandtsen on or before 60 days from the date of our Order $6,687.28 with interest at the rate of 6% per annum on any amount unpaid after 60 days as reparation from the injury caused by the respondent's violation of Section 17 of the Act.

We have reviewed the record as well as the conclusions of the Supreme Court in the second *Isbrandtsen* case and the subsequent relevant Acts of Congress. Under the circumstances, it is not considered that the motion of respondents, other than Isthmian Steamship Company, to remand the record and the recommended decision to

the chief examiner with the directions to rule on additional findings should be granted. The motion will be denied.

After due investigation and hearing, our conclusion in respect to the five complaints are as follows:

1. Complainant Isbrandtsen in Docket No. 726:

a. has proven its complaint of a violation of Sec. 17 of the Act by States Marine Corp. of Delaware, a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $5,455. as reparation for the injury caused by said violation;

b. has proven its complaint of a violation of Sec. 17 of the Act by Waterman SS Corp., a common carrier by water, and shall be paid on or before 60 days from the date of our order herein with interest at the rate of 6% per annum for every day after such 60 days until paid, the sum of $1,282.28 as reparation for the injury caused by said violation;

c. has not established that respondents should be ordered to cease and desist from using the exclusive patronage dual rate contract non-contract system, or such contract with shippers, or from using the spread and differential of four dollars ($4.00) per ton and any other spread or differential between contract and non-contract tariff rates or participating in such contracts;

d. is not entitled to any other additional and further relief;

2. Complainant Kempner in Docket No. 732:

a. has not proven its complaint of a violation of the Act by Lykes Bros. SS Co. Inc.;

b. has not proven its complaint of a violation of the Act by Kerr Steamship Company;

c. has not proven its complaint of a violation of the Act by States Marine Corporation of Delaware;

d. has not proven its complaint of a violation of the Act by Societa Italiana de Armamento "SIDARMA";

e. has not proven its complaint of a violation of the Act by Compania Maritima del Nervion;

f. has not proven its complaint of a violation of the Act by Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line);

g. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract/non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

h. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

3. Complainant Kempner in Docket No. 733:

a. has not proven its complaint of a violation of the Act against Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

c. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

d. has not proven its complaint of a violation of the Act by Mitsui Steamship Co., Ltd.;

e. has not proven it complaint of a violation of the Act by Kawasaki Kisin Kaisha, Ltd.;

f. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

g. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Eger and A. F. Klaveness & Co. A/S;

h. has not established that respondents should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

i. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

4. Complainant Galveston Cotton Co. in Docket No. 734:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc.;

b. has not proven its complaint of a violation of the Act by Nippon Yusen Kaisha, Ltd.;

c. has not proven its complaint of a violation of the Act by Fern-Ville Far East Lines/Barber-Fern-Ville Lines—Fearnley & Egar and A. F. Klaveness & Company, A/S;

d. has not proven its complaint of a violation of the Act by Waterman Steamship Corp.;

e. has not proven its complaint of a violation of the Act by Kokusai Lines Joint Service;

f. has not proven its complaint of a violation of the Act by Mitsui Steamship Company, Ltd.;

g. has not proven its complaint of a violation of the Act by States Marine Corp. of Delaware;

h. has not established that respondent should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike;

i. is not entitled to any other and further relief.

j. An order dismissing the complaint will be entered.

5. Complainant Texas Cotton Industries in Docket No. 735:

a. has not proven its complaint of a violation of the Act by Lykes Bros. Steamship Co., Inc., et al;

b. has not established that respondent should be ordered to cease and desist from the violations of the Act complained of or from using a dual rate contract non-contract type of tariff involving a spread or differential now being charged or any other differential or charge which will not be available to contract and non-contract shippers alike:

c. is not entitled to any other and further relief.

An order dismissing the complaint will be entered.

/s Thomas Lisi
Thomas Lisi
Secretary

APPENDIX "B"

Majority and Dissenting Opinions and Order of the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,658

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES,
Petitioners

v.

FEDERAL MARITIME COMMISSION (formerly FEDERAL MARITIME BOARD) and UNITED STATES OF AMERICA,
Respondents

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., The Common Carriers by Water, Members of THE FAR EAST CONFERENCE,
Intervenors

Petition for Review of an Order of the Federal Maritime Commission

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Decided January 10, 1963

Mr. Shelby Fitze, with whom *Messrs. Delmar W. Holloman* and *James T. Welch* were on the brief, for petitioners.

Mr. Paul D. Page, Jr., Attorney, Federal Maritime Commission, with whom *Mr. James L. Pimper*, General Counsel, Federal Maritime Commission, was on the brief, for respondent Federal Maritime Commission. *Messrs.*

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, and *Thomas D. Wilcox*, Attorney, Federal Maritime Commission, also entered appearances for respondent Federal Maritime Commission.

Mr. Joel E. Hoffman, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief, for respondent United States.

Mr. Edward S. Bagley, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, for intervenors Gulf/Mediterranean Ports Conference, et al. *Mr. Joseph M. Rault* was on the brief for intervenors Gulf/Mediterranean Ports Conference, et al.

Mr. Elkan Turk, Jr., with whom *Mr. Elkan Turk* was on the brief, for intervenors The Common Carriers by Water, Members of the Far East Conference.

Before WILBUR K. MILLER, DANAHER and WRIGHT, *Circuit Judges*.

PER CURIAM: The Federal Maritime Board[1] denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; and that, in any event, the so-called Moratorium Act[2] protected the carriers from liability which accrued before its passage.

The discriminatory rates here involved were not ap-

[1] The agency has gone through a succession of names. Since 1961 it has been called the Federal Maritime Commission.

[2] The Moratorium Act, 72 Stat. 574, amended Section 14 of the Shipping Act of 1916, 39 Stat. 733, 46 U.S.C. § 812.

proved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

Reversed and remanded to the Commission for assessment of reparations.

DANAHER, *Circuit Judge*, dissenting: The Supreme Court on May 19, 1958 decided *Federal Maritime Board v. Isbrandtsen Co., Inc.*, holding that a dual rate system which is "designed to destroy the competition of independent carriers" or "to stifle outside competition" or which otherwise employs predatory devices constitutes a "resort to other discriminating or unfair methods" in violation of section 14 of the Shipping Act of 1916.[1] As of the date of the Court's opinion, there were in existence many dozens of "conferences" subject to the jurisdiction of the Board.

Congress moved promptly because of the "grave doubts cast by the Supreme Court decision upon the legality of the dual rate system and the possible detrimental results to both American shipping and American foreign commerce."[2] The Senate feared for the "legality of the thousands of exclusive patronage dual rate contracts then used by more than half the 113 inbound and outbound steamship conferences serving U.S. ports. For many years, these dual rate conferences and the shippers they served had been parties to such contracts, with the tacit or express approval of the Federal Maritime Board."[3]

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[1] 46 U.S.C. § 801 *et seq.*

[2] H.R. Rep. No. 498, 87th Cong., 1st Sess. 3 (1961).

[3] S. Rep. No. 473, 87th Cong., 1st Sess. 2 (1961).

Congress therefore amended section 14 of the Shipping Act of 1916 "to provide that nothing in that act made unlawful any dual rate contract arrangement in effect at the time of the Supreme Court's decision (May 19, 1958), *unless and until disapproved, canceled, or modified by the Federal Maritime Board, in accordance with the standards in section 15 of the act.*"[4] (Emphasis added.)

Congress was not concerned with "rates." It deemed, however, of vital interest—at least until Congress had an adequate opportunity to review the problem—the threat to "any" dual rates. Clearly Congress considered that not all dual rate systems came within the purview of the Supreme Court's decision.

While the legislation was pending the Department of Justice reemphasized its historic position that "the system is inconsistent with the basic tenets of antitrust philosophy,"[5] but the Department's letter also emphasized[6] that the legislation

> "would validate any existing dual-rate arrangement, whether or not it had been approved by the Board, unless and until the Board disapproves, cancels, or modifies such arrangement. There are a number of conferences which now employ a dual-rate system that has not been expressly approved by the Board. The bill would permit these conferences to continue to use their unapproved systems, even though they have been on notice for more than four years that such unapproved systems are illegal, and even though such systems would have been illegal even if the Supreme Court decision had

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[4] *Ibid.*

[5] Letter of the Deputy Attorney General dated June 11, 1958 directed to Chairman Bonner of the House Committee on Merchant Marine and Fisheries.

[6] And for the reasons stated, our opinion in Isbrandtsen Co. v. United States has no bearing here. See 93 U.S. App. D.C. 293, 211 F. 2d 51, *cert. denied*, 347 U.S. 990 (1954).

gone the other way. However, in view of our having been advised that it is administratively not feasible for the Board to act on all of the as yet unapproved dual-rate arrangements in the next 2 years, the Department interposes no objection to this provision of the bill."

Thus fully advised in the premises and after extensive House hearings, Congress adopted Public Law 85-626[7] which amended section 14 of the Shipping Act of 1916 by inserting the following:

> "Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual-rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, *unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act.* The term 'dual rate contract arrangement' as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree." (Emphasis added.)

So read the law when the Board decided this case on August 4, 1961. Congress had amended the very Act from which the Board derived whatever authority it may have. Congress had spoken in behalf of a public policy of nearly a half century. As I read it, both the language of the statute and the congressional purpose are clear. It seems

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[7] 72 Stat. 574, as amended by 74 Stat. 253 extending the expiration date to June 30, 1961 and as further amended by 75 Stat. 195 extending the expiration date to September 15, 1961.

to me that on this record the Board could have done nothing but what it did do.[8]

Accordingly, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1962

No. 16,658

H. KEMPNER, GALVESTON COTTON COMPANY AND TEXAS COTTON INDUSTRIES,
Petitioners,

v.

FEDERAL MARITIME COMMISSION, AND UNITED STATES OF AMERICA,
Respondents.

Before: Bazelon, Chief Judge, Edgerton, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian,

[8] As a matter of additional emphasis, it should be noted that the 1958 amendment, as amended respecting expiration, was drafted to apply only to an arrangement, like that before us, in actual use by the members of a conference "on May 19, 1958," the date of the Court's Isbrandtsen decision, *supra*.

Congress, during the moratorium it had thus created, conducted extensive hearings, running through thousands of pages, as to which see H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961); S. Rep. No. 860, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 1247, 87th Cong., 1st Sess. (1961) [reproduced in 107 Cong. Rec. 19289-19291 (1961)]; and see, generally, Index to the Legislative History of the Steamship Conference/Dual Rate Law, S. Doc. No. 100, 87th Cong., 2d Sess. (1962). Thereupon, Congress enacted Public Law 87-346 (75 Stat. 762), approved October 3, 1961.

See section 15 as there amended in terms of congressional acceptance of the administrative interpretation, so long established, with specific requirements as to disapproval only after notice and hearing, and on the grounds specified. All "other agreements" coming within the purview of section 15 were to be approved.

It seems to me that congressional policy in this field beyond peradventure has been restated and reinforced. 46 U.S.C. § 814, e.g., additionally provides, as pertinent, that henceforth every permitted section 15 "agreement," like every section 813a "contract," the use of which may be permitted "by order" after the notice and hearing specified in section 813a, shall be entitled to the protection of the "exceptions" provided in sections 1-11 and 15 of Title 15.

Burger and Wright, Circuit Judges, in Chambers.

ORDER

On consideration of the petition of intervenors, Gulf Mediterranean Ports Conference, et al., for rehearing en banc, it is

ORDERED by the court that the petition is hereby denied.

PER CURIAM.

Dated: FEB 15 1963

Circuit Judge Danaher would grant the petition.

APPENDIX "C"

Shipping Act, 1916

Section 14:

No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—.

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair

methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense. (46 U.S. C.A. 812.)

"Moratorium Act":

(Amendment to Section 14 of August 12, 1958, Publ. L. 85-626, 85th Congress, 72 Stat. 574):

Provided, That nothing in this section or elsewhere in this Act, shall be construed or applied to forbid or make unlawful any dual rate contract agreement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under Section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act. The term "dual rate contract arrangement" as used herein means a practice whereby a conference establishes tariffs of rates at two levels the lower of which will be charged to merchants who agree to ship their

cargoes on vessels of members of the conference only and the higher of which shall be charged to merchants who do not so agree.

Sec. 2. This Act shall be effective immediately upon enactment and shall cease to be effective on and after June 30, 1960. (Approved August 12, 1958; extended to June 30, 1961 by Publ. L. 86-542, 74 Stat. 253; extended to September 15, 1961 by Publ. L. 87-75, 75 Stat. 195; Extended to October 15, 1961 by Publ. L. 87-252, 75 Stat. 521.)

Section 15 (before its amendment on October 3, 1961 by Publ. L. 87-346, 87th Congress, 75 Stat. 762):

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modi-

fy any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part; directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. (46 U.S.C.A. 814.)